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No. 83-276

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SELECTIVE SERVICE SYSTEM, et al.,
Appellants,

v.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP, et al.,
Appellees.

SELECTIVE SERVICE SYSTEM, et al.,
Appellants,

v.

BRADLEY BOE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

AMICUS BRIEF OF THE UNIVERSITY OF MINNESOTA, MACALESTER COLLEGE, MACALESTER COLLEGE COMMUNITY COUNCIL, WAYNE STATE UNIVERSITY, UNIVERSITY OF MICHIGAN, PACIFIC SCHOOL OF RELIGION, VASSAR COLLEGE IN SUPPORT OF APPELLEES

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INTERESTS OF THE AMICI CURIAE

All of the amici are respected institutions of higher education in the United States. These schools provide higher education opportunities to thousands of students each year and, through their graduates, provide a continuing supply of well trained and broadly educated citizens.

At each of these schools, a large number of the students receive financial assistance under Title IV of the Higher Education Act of 1965, 20 U.S.C. § 1070 *et seq.* Title IV creates the largest and most comprehensive financial aid program available for higher education. Its continuation, without restriction, is vital to the education of minorities and the needy in the United States. Each of the institutions is responsible for disbursing and administering aid under Title IV in accordance with law and regulation.

In amici's view, Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, which requires proof of draft registration as a precondition for financial assistance, substantially impairs the Title IV programs. This condition is wholly unrelated to the purposes of financial aid, and it substitutes the colleges' and universities' financial aid offices for the criminal justice system. As noted on the floor of the House, Section 1113 has "deputized" America's colleges and universities to enforce the draft registration requirement through the financial aid process. Remarks of Representative Schroeder, 128 Cong. Rec. H4762 (July 28, 1982).

It is as inappropriate to enforce the draft laws through Title IV aid as it would be inappropriate to enforce the tax laws or other criminal laws by withholding Title IV aid. See remarks of Congressman Peyser, 128 Cong. Rec. H4768 (July

28, 1982). It is not the business or purpose of colleges and universities or of Title IV to serve as the enforcement mechanism for the criminal laws. Institutions of higher education must be protected from such governmental intrusions which entangle them in governmental enforcement and divert large amounts of their resources to such purposes.

Amici take no issue with the underlying requirement of draft registration, which is currently enforced through criminal penalties. Amici believe, however, that, as found by the District Court, the requirements of Section 1113 are unconstitutional.

The individual amici are:

University of Minnesota

The University of Minnesota, which serves over 57,000 students on five campuses, is the largest public institution of higher education in the State of Minnesota. Its Twin Cities campus is the largest single campus in the United States. Each year, approximately $55,000,000 in financial aid subject to Title IV of the Higher Education Act and now Section 1113 is distributed to about 20,000 students.

Macalester College and
Macalester College Community Council

Macalester College is a private liberal arts college located in St. Paul, Minnesota, serving over 1,500 students from 49 states. In 1982-83, Macalester distributed over $1.5 million in financial aid under Title IV. Affidavit of Matthew Entenza, President, Macalester Community Council, at para. 3. The Macalester College Community Council is a body of students, professors and community members responsible for governance of the College.

Wayne State University

Wayne State University is a major public university—one of the three constitutionally autonomous universities provided for by the Michigan constitution. It is located in Detroit and serves a predominantly urban student population of 32,000, 53% of whom receive financial aid. Each year approximately twenty-one million dollars in financial aid subject to Title IV of the Higher Education Act, and now to Section 1113, is distributed to about 15,000 students.

University of Michigan

The University of Michigan is the oldest public institution of higher education in the state, having been established in 1817, before Michigan became a state. It is one of three major constitutionally autonomous universities established by 63 Mich. Const., Art. 8, § 5. The University's main campus is located in Ann Arbor, Michigan, and it has branch campuses in Flint, Michigan, and Dearborn, Michigan. The student population is approximately 40,000, of which roughly 50% are enrolled in professional degree programs or other graduate degree programs. Approximately 60% of the University's students receive financial aid. Each year approximately $45,000,000 in financial aid, subject to Title IV of the Higher Education Act and to Section 1113, is distributed to approximately 20,000 students.

The University of Michigan joins in this brief for the sole purpose of separately stating its overriding disapproval, as a matter of sound public policy, of two results produced by Section 1113: (a) the involuntary deputization of the University as enforcer of federal criminal law, and (b) the imposition upon the University of a significant annual administrative burden.

Pacific School of Religion

Pacific School of Religion is the oldest theological school in the West founded in 1866. It is a small private graduate school dedicated to the preparation of persons for the ministry of the church and ministry to the world. The institution is located in Berkeley, California and is primarily committed to preparing persons for the ordained leadership of various denominations. There are over 225 students enrolled in the school, representing at least 30 denominations. There are 180 full-time equivalent students. Each year approximately $115,000 of financial aid subject to Title IV of the Higher Education Act, and now Section 1113, is distributed to between 75 and 100 of our students.

Vassar College

Vassar College is a private liberal arts college located in Poughkeepsie, New York. It enrolls over 2200 students, approximately 40% of whom are male. In 1983-84, approximately $3,330,000 in financial aid under Title IV will be distributed to approximately 50% of Vassar's student body.

STATEMENT OF THE CASE

Section 1113 provides that a student who fails to register for the draft within 30 days of his eighteenth birthday is ineligible for all forms of assistance under Title IV. Title IV establishes several programs of financial aid for students pursuing higher education. These programs are the primary source of financial aid for higher education in the United States.

Title IV authorizes six major programs of financial assistance to students seeking higher education. These are National Direct Student Loans (NDSL), College Work Study Program (CSW), Supplemental Educational Opportunity Grants (SEOG), Pell Grants, State Student Incentive Grants (SSIG), and Guaranteed Student Loans (GSL). Most of these programs distribute funds based on the need of individual student applicants. Need is the difference between cost of attendance and the amount a student and his/her family is expected to contribute. See e.g. 34 C.F.R. 674.11-.13 (NDSL); 34 C.F.R. 675.9, .11-.13 (CWS) and 34 C.F.R. 676.9, .12-.13 (SEOG).

These programs distribute billions of dollars to millions of students each year. For example, in 1983-84, the Department of Education will distribute one billion dollars to almost two million students for just three of these programs—CWS, SEOG, and NDSL. Department of Education, Office of Post Secondary Education Campus-Based Programs Report No. 84-1, June 1983. And in fiscal year 1980 for all programs over nine billion dollars were disbursed in approximately seven and one-half million awards. Department of Education, Office of Student Financial Asst. Program Book, July, 1981 at 9-10.

Title IV aid goes predominately to students from families with low incomes and, in disproportionately large measure, to members of ethnic minorities. For example, in the Pell (formerly BEOG) and SEOG programs, over 70% of the

recipients are from families with incomes of less than $18,000 per year.[1] *Id.* at 13. For the CWS, NDSL and State Grant Programs, over 65% of all recipients are from families with incomes less than $18,000 per year.[2] *Id.* Further, in academic year 1978-79, 49.5% of all aid recipients in four major programs were minority group members, while in the United States as a whole, based on the 1980 census, only 17% of the population falls into minority categories. *Id.* at 16; Statistical Abstract of the United States.

At the University of Minnesota these programs constitute over 80% of the total financial aid available. Supplemental Affidavit of Robert I. Misenko, para. 3. Similarly high percentages undoubtedly apply for other colleges and universities.

All of the Title IV programs are administered directly by universities and colleges throughout the United States. By the terms of Section 1113 and its implementing regulations, these colleges and universities are now responsible for collecting statements of registration compliance which indicate the applicant's draft registration status and for obtaining verification of those compliance statements. 34 C.F.R. §§ 668.24 and .26. Based on these documents, the colleges and universities are required then either to grant or deny Title IV assistance to students.

The draft registration requirements in Section 1113 are unrelated to the purposes of Title IV and bear no resemblance to the other requirements for financial assistance. Virtually

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[1] The average family income for the entire United States in 1979-80 was $23,177 per year. Provisional Estimates of Social and Economic Housing Characteristics, PHC 80-S1-1, United States Census Bureau.

[2] Summary statistics for all programs indicate that 52% of all recipients come from families with incomes less than $18,000 per year. An additional 34.5% of all recipients are either independent or unknown, leaving only 12.4% from families with incomes in excess of $18,000 per year. *Id.*

all of the program requirements relate to the need of the individual, their enrollment in institutions of higher education, and the use of the funds for educational purposes. See, *e.g.*, 20 U.S.C. § 1091, 34 C.F.R. 674.11-.13, 34 C.F.R. 675.9, .11-.13, and 34 C.F.R. 676.9, .12-.13. In their unwanted role as enforcers, the colleges and universities are required to deny financial assistance to certain students which effectively denies them access to higher education.

At this point in history, higher education is a virtual prerequisite to successful advancement in most careers. In the professions of law, medicine and dentistry, for example, successful completion of degree requirements is an almost universally required credential for licensure. In virtually all areas of commerce, industry and the arts, individuals are assessed and allowed access to many positions of importance based on the extent of their higher education.

Those who obtain higher education degrees not only earn more money and have access to more jobs, but they are also personally improved and broadened by their exposure to higher education. See, Howard R. Bowen, Investment in Learning (1977) and National Commission on Excellence in Education, A Nation at Risk (1983). If the purposes of higher education are fulfilled, the students' lives are made more full and society as a whole is improved. *Id.* As noted by the National Commission on Excellence in Education, providing financial assistance for this higher education is a clear responsibility of Federal Government. *Id.* at 33.

Amici do not believe it is appropriate for them to deny anyone the access to higher education where, as here, that denial is based on grounds that have no relationship to higher education or to the purposes of financial aid. Amici object in particular to being deputized as enforcers of what they believe to be an unconstitutional statute.

SUMMARY OF ARGUMENT

I. Section 1113 is a Bill of Attainder. It legislatively identifies a group of individuals, those who have not registered for the draft, determines their guilt, and imposes punishment upon them.

By its own terms Section 1113, without benefit of judicial trial, makes ineligible for financial assistance the politically unpopular group of all individuals who are required to register for the draft and have not done so in accordance with the law. The punishment imposed on this group is denial of financial aid and the ability to pursue various careers through higher education. Since failure to register is a crime, in many instances a double penalty is imposed on this group. The legislative history demonstrates that the proponents were aware of and intended these punitive effects.

II. Section 1113 requires students to incriminate themselves in violation of the Fifth Amendment by furnishing a certificate of compliance with the registration laws as a precondition for financial aid. The information sought is clearly incriminating and is compelled by the denial of financial aid if the information is not provided. This penalty is, in effect, a denial of higher education and an excessive burden on the exercise of the Fifth Amendment privilege.

III. Section 1113 creates distinctions based on gender and wealth that have no relationship to legitimate governmental purposes. Section 1113 only applies to men, which is permissible for the purpose of the draft, but has no place in the distribution of financial aid. Moreover, Section 1113 enforces the Selective Service Act only against recipients of Title IV aid, who are primarily poor and disproportionately from minority groups. There can be no legitimate governmental purpose for targeting poor and minority students for enforcement when all individuals are required to register.

ARGUMENT

I. SECTION 1113 IMPOSES PUNISHMENT ON MALE EIGHTEEN YEAR OLD NON-REGISTRANTS WITHOUT THE BENEFIT OF A TRIAL AND IS THEREFORE A BILL OF ATTAINDER.

The Constitution prohibits the enactment by Congress of bills of attainder in Article 1, Section 9, Clause 3: "No Bill of Attainder or ex post facto Law shall be passed." This prohibition is one of the few express limitations on congressional action contained in the original constitution. It was considered so important to a fair and ordered government that it was passed unanimously and without debate by the constitutional convention. *United States v. Brown*, 381 U.S. 437, 441 n.6 (1968).

The clause is intended to prohibit legislative punishment of an individual or specific groups of people. *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). The Bill of Attainder clause has been utilized primarily in cases such as the one before the court in which an over-zealous Congress seeks to strike out at groups it perceives as disloyal.

The Court has adapted the concept of attainment in accordance with its purposes to include modern day forms of punishment or of group identification which were unknown at the time of the framing of the Constitution. As the Court indicated in *Brown*, 381 U.S. at 442, "the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature." In essence, the Bill of Attainder Clause prohibits the Congress from usurping judicial power and imposing sanctions on groups or individuals which it disfavors.

Viewed in this broad context, Section 1113 is a Bill of Attainder. Its first section, Section 1113(f)(1), makes ineligible for federal financial aid those who failed to register in accordance with 50 U.S.C. App. (& Supp. V) 453. This same conduct is already subject to criminal sanction under 50 U.S.C. App. (& Supp. V) 462, but only after a full criminal trial.

The contrast could not be more stark. The same conduct is subject to two different penalties. The only difference is that in one case the violation is determined by the courts and in the other the violation has already been determined by Congress. Plainly the law usurps the judicial function and imposes the penalty without trial. The reluctant administrators of this illegal scheme are the colleges and universities of this country which are required to seek the statements of registration compliance and verification and impose the penalty implicit in the denial of financial aid.

Section 1113 thus contains all three elements of an unconstitutional Bill of Attainder. First, the statute determines the guilt of an identifiable group. *United States v. Brown*, 381 U.S. at 445, 447. Second, the statute inflicts punishment. *Nixon v. Administrator of General Services*, 433 U.S. at 468. Third, the statute imposes that punishment without the protection of a judicial trial. *Id.*

A. Section 1113 identifies a specific group of individuals who have not registered for the draft.

As the District Court found, the statute legislatively identifies a group of individuals, *i.e.*, "young male students who require financial aid but cannot complete truthful statements of compliance." Jurisdictional Statement, Appendix A at 10a (hereafter J.S. App.). This group is comparable to those

identified in other legislation which this Court has found to be unconstitutional Bills of Attainder.

For example, in *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867), and *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1867), the Court struck down loyalty oaths required of ministers and attorneys, respectively. Similarly, in *United States v. Brown*, 381 U.S. 437 (1965), the identified group was all Communist Party members. The group isolated by Section 1113—students who have applied for financial aid but cannot truthfully complete a statement of compliance—is smaller and more easily identified than any of the groups in *Cummings*, *Ex Parte Garland*, or *Brown*.

Further, as in *Cummings* where the loyalty oath bore no relationship to the profession, the requirements of Section 1113 bear no relationship to the purposes of financial aid. Just as the loyalty oath was designed "to reach the person not the calling", 71 U.S. at 320, Section 1113 is designed to reach the specific group of individuals who have not registered for the draft and to distinguish them from all others who have applied for financial aid.

The Government argues that the group identification requirement is not met because individuals can simply register and therefore make themselves eligible for financial aid. Appellants' Brief at 15. This argument is based on the regulatory scheme adopted by the Secretary of Education, which allows non-registrants to register at any time, whether or not in compliance with the registration requirement, and thereby to qualify for aid for purposes of Section 1113. 34 C.F.R. 668.27(b). In its Brief, the Government is careful to note that those subject to the registration requirement are *not* "free for all purposes to register whenever they please." Appellants' Brief at 17 n.7. Failure to register within the 30-day period remains a crime subject to prosecution. *Id.*

As noted by the District Court, the Government's argument and the regulation on which it is based are contrary to the plain meaning of Section 1113. J.S. App. B at 34a. The statute mandatorily makes ineligible any person "who is required under section 3 [50 U.S.C. App. (& Supp. V) 453] to present himself for and submit to registration and fails to do so in accordance with any proclamation issued under such section." For those subject to 50 U.S.C. App. (& Supp. V) 453, Presidential Proclamation No. 4771 requires that registration must occur within 30 days of the eighteenth birthday. The provision is unambiguous and plainly requires registration within 30 days of the eighteenth birthday to establish eligibility for financial aid.

The Government's suggestion that "in accordance with" can be interpreted to mean "in the manner required" and thereby allow late registration is contrary to the natural meaning of the words. Appellants' Brief at 17. First, "in accordance with" can only mean in compliance with all the requirements of the Presidential Proclamation and not, as the Government suggests, in compliance with the act of registration but not with the mandatory timing of the registration as required by the same Proclamation. The Government's suggestion gives the words "in accordance with" a meaning that is unnatural and which they do not hold. It should be rejected by the Court.[3]

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[3] While it is unnecessary to reach the legislative history in the face of the clear wording of the statute, *TVA v. Hill*, 437 U.S. 153, 184 n.29 (1978), it is important to note that, at least in the House, an amendment proposed by Representative Simon would have allowed students to "complete and submit the necessary forms for registration *at the time of filing application* for such grant, loan or work assistance", 128 Cong. Rec. H4758 (July 28, 1982). (Emphasis added.) The amendment was defeated, evidencing an intent not to allow registration at the time of the loan application. *Id.* at H4769.

Second, the Government's own regulations concerning Student Assistance General Provisions, 34 C.F.R. part 668, which include the regulations interpreting Section 1113, use the phrase "in accordance with" or "in accord with" no less than six times. 34 C.F.R. § 668.2(b)(1), .14(2), .14(e)(7), .27(a)(7), .27(b)(2), and .28. Certainly, the Government cannot mean that in each instance any time limitations referred to should be ignored because "in accordance with" means compliance with some but not all the referenced sections. Such an interpretation would make nonsense of the regulations as the Government's argument makes nonsense of the English language.

Finally, the Government's regulations under Section 1113 were issued on April 11, 1983, after the issuance of a preliminary injunction in this case on March 9, 1983. On this issue, the regulations are a blatant attempt to change the law by administrative fiat in hopes of bolstering its constitutionality. Section 1113 is what is at issue here. The conflicting regulations cannot save it and should be ignored by the Court.

B. Section 1113 imposes punishment by depriving students of financial aid for higher education.

Turning then to the second element of a Bill of Attainder—punishment—this Court concluded in *Nixon v. Administrator of General Services, supra,* that there are three ways to analyze whether a statute imposes punishment—historically, functionally, or motivationally. The District Court reviewed the impact of Section 1113 in light of each of these criteria, concluding with respect to each that punishment had been imposed. J.S. App. at 12a-17a.

With respect to the historical test, the District Court found that deprivation of financial aid for higher education is

similar in effect to the punishment of prohibiting persons from certain vocations imposed in *Cummings*:

> The fact that the challenged statute deprives students of the practical means to achieve the education necessary to pursue many vocations in our society means only that the congressional means of effecting the deprivation is less direct;

Id. at 14a.

The District Court's finding is consistent with the concept of punishment in *Cummings* that "the deprivation of any rights, civil or political, previously enjoyed may be punishment" and carries out this Court's directive in *Cummings* that "what cannot be done directly cannot be done indirectly". 71 U.S. (4 Wall.) at 320, 326.

The District Court's analysis reflects the reality that a denial of financial aid is a denial of higher education, and denial of access to higher education closes off career opportunities and, indeed, entire professions. Title IV provides financial aid to almost two million students each year who are dependent on that aid for their education. For example, at the University of Minnesota Title IV aid constitutes 80% of all financial aid and, as is amply demonstrated by the anonymous plaintiffs, without aid they may not obtain education. In essence, the punishment is the same as in *Cummings* and *Ex Parte Garland*, where failure to give loyalty oaths denied those individuals ongoing careers as a minister and a lawyer. Here, the denial of education just as surely cuts off any access to those or similar careers.

Since legislation can be fashioned to impose new burdens and deprivations different from those historically recognized as punishment, the Court has also looked to the function of the statute to analyze "whether the law under challenge,

viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes". *Nixon*, 422 U.S. at 475-76. The District Court concluded that under such a functional analysis Section 1113 constitutes punishment. J.S. App. A at 16a. The District Court, following the analysis cited by this court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1962), set forth the factors it considered important as follows:

> The court believes that § 1113 fails the functional test. It imposes both a restraint and disability, assumes nonregistrants possess guilty intent, promotes the aims of retribution and deterrence, applies to behavior that is already a crime, and is excessively broad in relation to its alternative purposes. The court is also not persuaded that the purposes defendants allege are really alternative: under defendants' theory that the law does not punish nonregistration but encourages registration, every "punishment" could be renamed an "encouragement" thereby escaping the Constitution's proscription on bills of attainder.

Id.

Plainly, Section 1113 imposes a restraint and a disability by making certain individuals ineligible for federal financial aid. This change in their status is an affirmative disability in obtaining higher education and acts as a restraint on their ability to obtain jobs or advancement.

Second, Section 1113 assumes guilty intent or scienter in its definition of those made ineligible. That is, all persons who have not registered are assumed to be culpable (and thus must suffer denial of aid) even though they may have failed to register unintentionally.

Third, Section 1113 promotes the aims of retribution and deterrence by its very existence. This is probably best illustrated by the fourth reason, which is that non-registration is already a crime. The civil statute double punishes that group of non-registrants who are seeking higher education. This double punishment furthers the same retribution and deterrence values that the criminal statute itself does. In fact, like the statute in *Kennedy* which imposed "an additional penalty for a special category of draft evader" 372 U.S. at 169-170, Section 1113 imposes an additional penalty for a special category of non-registrant.

Finally, the primary purpose suggested by the Government is to "encourage" registration. Appellants' Brief at 26. As the District Court noted, this is simply a euphemism for "punishment" and every punishment could be redefined in this way. J.S. App. A at 16a. Moreover, as is fully demonstrated in the discussion of the congressional debate *infra*, it is highly doubtful that the suggested alternative purposes were the intended purpose.

The third and final recognized test of punishment is "strictly a motivational one: inquiring whether the legislative record evinces a congressional intent to punish." *Nixon v. Administrator of General Services*, 433 U.S. at 479. The legislative record of Section 1113 is replete with statements that show a clear and unmistakable intent to punish those individuals who have not registered.

Perhaps the best example of this intent is found in the remarks of Representative Solomon, the author of the amendment, who stated that those who have registered "sorely resent the other 7 percent of Americans who have either

intentionally or unintentionally chosen not to register".[4] 128 Cong. Rec. H4757 (July 28, 1982). Representative Solomon's punitive intent is further illustrated by his remarks that he intended:

> [N]ot only to offer this amendment to this legislation, but as other legislation comes down the pike, . . . until every young man is deprived of any kind of Federal assistance unless he has obeyed the law . . .

Id.

In fact, virtually all the members of the House who spoke in support of the amendment indicated a similar intent to punish non-registrants. For example, Representative Mitchell commented "As the gentlemen said, the 500,000, it is a felony, they have violated the law, and they are not entitled to these educational benefits" 128 Cong. Rec. H4757 (July 28, 1982).[5]

The punitive intent of the amendment was recognized by several of the opponents of the measure, most notably by Representative Edgar:[6]

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[4] At two points in its brief, the Government suggests without complete quotation that Representative Solomon did not intend to punish unintentional violators. Appellants' Brief at 24 and 26. However, Representative Solomon's actual words, all in the past tense, do not indicate any such lenient attitude or any intent to treat unintentional violators any differently from intentional violators. Representative Solomon was obviously proud of the fact of his "equal treatment" of non-registrants, all of whom he intended to deprive of financial assistance.

[5] See also the remarks of Representative Mitchell: "I do not see any reason at all why they should get benefits from the country," 128 Cong. Rec. H4757; and Representative Hartnett: "The Chinese laundry operator had an old saying 'No ticket, no laundry.' I think the American people fully expect their young men, if they are going to receive financial assistance from this Government, to at least abide by the laws of this land." *Id.* at H4765.

[6] See also the remarks of Representative Moffet: "additional penalty" 128 Cong. Rec. H4758; Representative Patterson: "what is the intended punishment for those who do not need or require student aid assistance." *Id.* at H4760; Representative Goldwater, *id.* at H4761.

> I also question the premise that punishment should be used in order to induce young men to obey the law. This amendment has the obvious primary objective of increasing the number of men registered for the draft. However, *it also has a secondary, and more subtle, objective, which is to punish those individuals who do not register.*

Id. at H4760 (emphasis added).

The proponents did not attempt to disavow this punitive intent; indeed, they embraced it and rejected a less onerous version of the amendment which would have allowed students to register at the time of applying for financial aid or to declare their religious or moral objection to registration. 128 Cong. Rec. H4758.[7]

In the Senate there was less debate, but the intent of the major proponent, Senator Hayakawa, was clear. In a passage cited by the District Court, Senator Hayakawa said:

> It is a real travesty when those who will not register can turn around and apply for . . . educational benefits . . . . This [bill is] an important signal to every American that this Congress will not tolerate any willful, blatant rejection of the responsibilities which come with living in a free nation.

128 Cong. Rec. S4944 (May 12, 1982).

The motivation behind Section 1113 was to punish those who had not registered. The members of both the House and the Senate were keenly aware that criminal penalties already existed for non-registration. Despite those existing penalties,

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[7] The amendment was offered by Representative Simon and was later amended to exclude the religious or moral objection section. The amendment was defeated in both forms. 128 Cong. Rec. H4768, H4770.

they plainly wanted to impose added punishment. As Senator Durenburger commented, Section 1113 is "a case of overkill", 128 Cong. Rec. S4945 (May 12, 1982).

C. Section 1113 does not provide the protection of a judicial trial.

Finally, there can be no argument that Section 1113 does not provide the protections of a judicial trial. There is no provision for a trial. The procedure is for the college or university to deny the financial aid based on the statement of registration compliance and subsequent verification.

The only attempt at due process is an after-the-fact hearing in which the student bears the burden of proof. Section 1113(f)(4); 34 C.F.R. § 668.27. This provides almost none of the protections of a judicial trial and is clearly inappropriate where the real issue being adjudicated is the crime of failing to register. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

II. THE REQUIREMENT THAT AN APPLICANT FOR FINANCIAL AID FURNISH A "CERTIFICATE OF COMPLIANCE" AS PART OF THE FINANCIAL AID APPLICATION PROCESS VIOLATES THE FIFTH AMENDMENT'S PROTECTION AGAINST SELF-INCRIMINATION.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." This protection exists in every governmental proceeding, "be it criminal or civil, administrative or judicial, investigatory or adjudicatory." *Murphy v. Waterfront Commissioner of New York Harbor*, 378 U.S. 52, 94 (1964). An individual

is entitled to the protection of the Fifth Amendment so long as three conditions are met. First, the individual must be involved in a governmental proceeding. Second, the individual must reasonably believe the information sought will be incriminating. *In Re Gault*, 387 U.S. 1, 47-48 (1967). Third, the government must in some fashion compel the individual's testimony. *Garrity v. New Jersey*, 385 U.S. 492, 498 (1967). In the present case the government contests only the existence of the third of these three conditions.

A. Section 1113 places an unreasonable burden on the exercise of a financial aid applicant's Fifth Amendment right to refuse to incriminate himself.

Since an unregistered applicant for financial aid, such as the appellees here, knows that a truthful disclosure of his registration status may prove incriminating, his only reasonable alternative is to invoke his Fifth Amendment right and refuse to answer that question. The assertion of the Fifth Amendment privilege will result, however, in an automatic denial of financial aid. This denial imposes an excessive penalty for the exercise of the applicant's constitutional rights. Section 1113 attempts to coerce financial aid applicants to waive their Fifth Amendment privilege and thus violates the privilege.[8]

This Court has long held that the government may not employ coercion of any sort to induce a person to surrender his privilege against self-incrimination. *Bram v. United States*, 168 U.S. 532, 542-543 (1897) ("[A] confession must not be

[8] Unlike *Minnesota v. Murphy*, 52 U.S.L.W. 4246 (February 22, 1984) appellees here face the certain imposition of a penalty if they choose to exercise their Fifth Amendment privilege. See Appellants' Brief at 30 n.14.

extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence . . ."); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). The fatal constitutional defect in Section 1113 is that it deprives applicants of financial aid because, and only because, they choose to exercise their Fifth Amendment privilege.

This penalty is an excessive burden on the right to refuse to incriminate oneself. The inability to obtain funding for education deprives students of the opportunity to obtain an education and pursue their chosen livelihood. The Court has held repeatedly that a penalty of this sort may not be imposed on the exercise of Fifth Amendment rights. *See generally Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Lefkowitz v. Turley*, 414 U.S. 80 (1973); *Uniformed Sanitation Men Association, Inc., et al. v. Sanitation Commissioner*, 392 U.S. 280 (1968); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Spevack v. Klein*, 385 U.S. 511 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967). In *Lefkowitz v. Cunningham*, the Court explained the import of these cases as follows:

> These cases settle that the government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized. It is true, as appellant points out, that our earlier cases were concerned with penalties having a substantial economic impact. But the touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids.

Id. at 806.

The deprivation of educational benefits is an injury no less harmful than the loss of a job. *Cf. Garrity v. New Jersey*, 385 U.S. 493 (1967) (firing of police officers for refusing to waive their Fifth Amendment privilege); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (expulsion from and ban on holding political and party office for refusing to waive Fifth Amendment privilege). The long range economic consequences on an applicant are likely to be severe and lasting, certainly as severe as in other cases where a person has been afforded Fifth Amendment protection. *Cf. Lefkowitz v. Turley*, 414 U.S. 103 (1973) (licensed architects were protected by the Fifth Amendment even though penalty for assertion of privilege was only a temporary suspension from public employment). Section 1113 attempts to attach a substantial economic sanction to the exercise of the Fifth Amendment privilege against self-incrimination.

The government offers two main lines of reasoning to save Section 1113. First, the government asserts that no problem of legal compulsion arises because appellees have not been served with a summons or subpoena. Appellees could simply not apply for financial aid, the government asserts, and so avoid the necessity of providing any information. This argument exults the form of the procedure over the substance of its effect. The Court has held that the Fifth Amendment applies to every government proceeding. The protection of the Fifth Amendment need not be invoked by the magic of a subpoena or summons.

Further, the novel idea that one does not need the protection of the Fifth Amendment if the option is available of suffering economic loss rather than incriminating oneself is wrong. In many of the decided cases, the option of losing one's job was available as an alternative to perjury or self-

incrimination. See, *e.g.*, *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Lefkowitz v. Turley*, 414 U.S. 80 (1973); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977). In no case has the Court suggested that this option obviates the need for the Fifth Amendment.

The Government's second argument is a circularity. It argues that applicants who have not registered for the draft are not eligible for federal financial aid, need not bother to apply for it, and, therefore, need not worry about incriminating themselves. Appellants' Brief at 31. The argument assumes that the government may validly impose a condition on financial aid that requires surrender of an individual's self-incrimination privilege. Thus, the argument does no more than return to the question of whether the Government may impose a penalty on the assertion of the Fifth Amendment privilege against self-incrimination. See *Field v. Brown*, 610 F.2d 981 (D.C. Cir. 1979), *cert. den.* 446 U.S. 939 (1980). This court has held repeatedly that it may not.

Even if the Court accepts the government's assertion that a failure to register may be "cured" by late registration for the purposes of receiving financial aid, Section 1113 still remains fatally defective. In that case an applicant may be eligible for financial aid and also liable to prosecution for failure to register.[9] 50 U.S.C. App. (& Supp. V) 462. This situation poses an even crueler dilemma. An individual is faced with the choice of either foregoing educational benefits and the loss of preparation for a career or incriminating himself by applying for and receiving financial aid. The crucial evidentiary link is information required of the individual himself, and this information is protected by the Fifth Amendment

[9] See Appellants' Brief at 17 n.7 where the Government advances the novel argument that late registration is permissible for purposes of financial aid, yet remains a prosecutable crime.

privilege against self-incrimination. *Hoffman v. United States*, 341 U.S. 479 (1951); *Murphy v. Waterfront Commissioner*, 378 U.S. at 94 (White, J. concurring).

Turn and twist as it may, appellant cannot evade the simple logic of the Fifth Amendment. Section 1113 exacts a penalty if the appellees in the present case will not perjure themselves or waive their right under the Fifth Amendment to refuse to incriminate themselves. This is a choice which the Fifth Amendment forbids the government to force upon individuals. Section 1113 is therefore unconstitutional.

III. SECTION 1113 DISCRIMINATES BASED ON WEALTH AND GENDER WITHOUT SUFFICIENT JUSTIFICATION.

Though not dealt with by the District Court,[10] two genuinely troubling aspects of Section 1113 are the discrimination based on wealth and race that it imposes on the enforcement of the selective service laws and the discrimination based on gender that it imposes on Title IV. These unfair distinctions flow from the very nature of Title IV and serve to highlight the folly of utilizing Title IV as the enforcement mechanism for draft registration. Title IV is a gender neutral statute that distributes aid primarily based on need. Thus, aid is disbursed to individuals predominately from families who are the least able to support themselves and whose average family income is well below the national average. Recipients are disproportionately composed of minority group members.

Section 1113 perverts the lawful distinctions created by Title IV by making gender a criterion for financial aid and

[10] These claims were pled by the plaintiffs (Complaints, Counts 3 and 4, Joint Appendix at 14 and 27) and briefed to the District Court.

utilizing a draft registration enforcement tool that is pointedly aimed at minority persons and people without wealth. The distinctions are not supported by legitimate governmental purposes and are therefore unconstitutional.

A. The Additional Title IV Eligibility Requirement Imposed by Section 1113 has no Nexus to and Furthers no Purpose of Title IV.

The Fifth Amendment's due process clause prohibits federal defendants from engaging in discrimination so unjustifiable as to be violative of due process. See, *e.g.*, *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Bolling v. Sharpe*, 347 U.S. 497 (1975). In deciding Equal Protection issues under the Fifth Amendment, Fourteenth Amendment tests apply. See, *e.g.*, *Rostker*, 453 U.S. at 62 n.3.

When, as here, a statute makes a sex based classification, the Court applies a "heightened scrutiny" test, which requires that the classification be substantially related to the achievement of an important governmental objective. See, *e.g.*, *Craig v. Boren*, 429 U.S. 190 (1976). Thus, to be valid, Section 1113 must serve an important governmental objective of Title IV. The purpose of Title IV is to make post-secondary education benefits available to students who are enrolled in eligible institutions and who maintain satisfactory academic progress. 20 U.S.C. §§ 1070(a), 1091(a)(1-5). Section 1113 does not aid this purpose.

The gender based distinction of Section 1113 furthers no purpose of Title IV. None of the other requirements for financial aid are gender biased and it is difficult to imagine a rationale for making financial aid more readily accessible for women than men. Plainly, men and women are equally deserving of education and should be treated equally through

gender neutral criteria. Sex discrimination in education programs receiving federal funds is also expressly prohibited by Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq.

Indeed, the rationale of *Rostker v. Goldberg*, 453 U.S. 57 (1981) in upholding the gender based distinction of the draft registration law itself compels the rejection of that distinction in Title IV programs. In *Rostker*, the Court reasoned that men and women are not similarly situated for the purposes of a draft or registration for a draft because combat restrictions are placed on women. 453 U.S. at 78. Men and women are similarly situated, however, for purposes of federally funded statutory higher education grants and loans under Title IV. Thus, Section 1113's gender based distinction cannot withstand constitutional scrutiny.

B. Section 1113 Provides for Enforcement of the Selective Service Act on a Basis that Unlawfully Discriminates Based on Wealth.

When analyzing a wealth based classification, the Court has required that the classification bear a rational relationship to legitimate legislative purposes. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 20-29 (1973); *U.S.D.A. v. Moreno*, 413 U.S. 528 (1973). However, the Court has carefully analyzed such classifications to determine if they impinge on a suspect classification. *Id.*

In the present case, Section 1113 utilizes Title IV as the enforcement vehicle for the Selective Service Act. By doing so, it picks up the wealth based distinctions legitimately and lawfully included in Title IV and makes them part of the enforcement policy of the Selective Service Act. While the wealth based distinctions are rationally related to Title IV, they bear no such rational relationship to the Selective Service Act.

Title IV aid goes predominately to individuals from less well off families. For instance, in two of the programs, Pell and SEOG, over 70% of the aid goes to recipients from families with incomes of less than $18,000 per year.[11] This is $5,000 per year less than the average family income for the United States. See Provisional Estimates of Social and Economic Housing Characteristics, PHC80-S1-1, U.S. Census Bureau.

As a result of the need criteria, Title IV aid is disproportionately distributed to minority group recipients. In one recent academic year, 49.5% of the recipients in the four major aid programs were from minority groups. Department of Education, Office of Student Financial Assistant Program Book, July, 1981 at 16. This compares with a 1980 United States population which is 83% white and 17% minority. Statistical Abstract of the United States. There are over twice as many minorities in the recipient group as would be expected based on the United States population.

In essence, Section 1113 by statute targets these persons for enforcement of the draft registration law. In fact, Rep-representative Solomon recognized and embraced this discriminatory effect in his remarks on the House floor:

> Now, maybe we are discriminating against the poor. And if we are, I guarantee I am going to come back

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[11] Department of Education, Office of Student Financial Assistant Program Book, July, 1981 at 9-10. The actual numbers are:

	Family Income		
	Less than $6,000	$6,000-$11,999	$12,000-$17,999
Pell	41.9%	21.7%	12.8%
SEOG	42.7%	20.8%	15.0%

> with legislation on this floor tomorrow and the next day and the next day and every day of this session with amendments that will prohibit any funds from being used for the Job Training Act if the are not registered, for any unemployment compensation insurance if they are not registered, and for any kind of taxpayer's money if they are not registered.

128 Cong. Rec. H4767 (July 28, 1982).

There can be no conceivable legitimate legislative purpose in enforcing the draft registration laws in this unfair manner. Since there is no connection between the classification and a legitimate legislative purpose, Section 1113 violates the equal protection guarantees of the Fifth Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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